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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/751,535

01/06/2004

Van Miller

1358-01

3319

58388

7590

09/18/2006

GOWAN INTELLECTUAL PROPERTY  
1075 NORTH SERVICE ROAD WEST  
SUITE 203  
OAKVILLE, ON L6M-2G2  
CANADA

EXAMINER

TRAN LIEN, THUY

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 09/18/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/751,535

Applicant(s)

MILLER, VAN

Examiner

Lien T. Tran

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 18 April 2006.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-9 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 1-9 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.  
5) ☐ Notice of Informal Patent Application  
6) ☐ Other: \_\_\_\_\_.

Claims 1-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chaudhary.

Chaudhary discloses a high dietary fiber product. The product is produced by drying brewer's spent grain. The high dietary fiber product comprises 70% fiber, 5.8% crude fat and about 20% protein. The product is used to prepared extruded food product such as raisin bran and is used in amount of 25%. The product is also used in baked products such as bread in amount of 15%. ( see col. 1 lines 50-59, col. 2 lines 21-31 and col. 3 lines 3-10, and table 1)

Chaudhary does not disclose the source of grain from which the spent grain is made, the addition of water, the pH as claimed, the addition of sodium bicarbonate and products as cited in claims 8-9.

It would have been obvious to choose the spent grain from any known source and all the cereal grains claimed are well known in the art. As to the additional components, the product of Chaudhary is obtained from spent grain which is the same source of material as claimed; thus, it is obvious the components are the same. If the components are not the same, it would have been obvious to one skilled in the art to fractionate the spent grain to obtain fractions having any selected additional components such as minerals, amino acid and lysine depending on the nutritional status desired. This would have been within the determination of one in the art. The product of Chaudhary is added to baked product; thus, it would have been obvious to add water to the product to hydrate it thereby facilitating it addition to the baked product. The amount of water added depends on the product made and the amount of fiber product

added; this can be determined by one skilled in the art through routine experimentation. Since the product is obtained from the same source as claimed, it is obvious the initial pH is the same as claimed because the specification does not disclose adding anything to alter the pH. It would have been obvious to increase the pH depending on the product made. For example, some baked product require leavening agent such as sodium bicarbonate which would increase the pH of the product. Chaudhary discloses using the fiber product in baked products; thus, it would have been obvious to add the fiber to any baked product including cookie, muffin, waffle and nutri-bar when wanting to make baked products having a high fiber content. Since the fiber product is from the same source as claimed, it is obvious it possesses the property of having reduced glycemic index.

In the response filed 4/18/06, applicant argues the examiner ignores the teachings in paragraphs 49-50 of the specification. The basis of this argument is not understood because the issue of the moisture content is not relevant to the claims and the rejection. There is nothing in the claims about moisture content. The same issue is taken with the argument about fractionation. The claims do not exclude products obtained from fractionation. The limitation for use in the baking industry is an intended use of the product and does not determine its patentability. Applicant argues the patent teaches a highest fiber fraction which contains about 70% fiber and about 20% protein. The patent discloses several fractions with varying protein and fiber content. For example, there is disclosed the coarse fraction which contains 18-22% protein and 65-75% fiber; there is also a fraction containing 21% protein and 67% fiber. All of these

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fractions contain protein and fiber within the range claimed for the baking ingredient because claim 1 recites the ingredient containing 20-30% protein and 50-80% fiber. Applicant's reference to table 1 and the statement "this is not, it is suggested, a teaching of 70% fiber or a teaching of about 20% protein" is not understood. There is no requirement that the fraction only has 70% fiber or about 20% protein; the claims do not recite this numerical range. As cited above, all the ranges disclosed in the patent have the fiber and protein content falling within the range claimed. Applicant argues the patent teaches extruded food products such as raisin bran which is not baked products per se. Applicant's attention is directed to column 3 lines 6-7 where the patent discloses the high fiber fraction has also been incorporated in baked products such as bread. With regard to the issue of the pH, it is stated in the rejection that the initial pH of the fiber ingredient in the patent is the same because it is obtained from the same source. The rejection also states that the pH of the ingredient can be increased depending on the product it is used in. Some baked products require the addition of alkaline agent such as sodium bicarbonate to react with acidic leavening agent that is commonly added. Applicant argues this statement is made after reading the disclosure. The examiner respectfully disagrees because the addition of alkaline agent is so well known in making baked products; thus, its addition would have been obvious to one skilled in the art. Applicant argues the rejection is based on hindsight. This argument is not persuasive. It cannot be hindsight if the patent discloses an additive that contains fiber and protein falling within the range claimed and the additive is used in baked product. It is not an issue to consider how the additive is made because the claims are

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directed at a product, not how the product is made. While applicant states the claimed additive is different from the prior art, applicant does not point out what this difference is.

Applicant's arguments filed 4/18/06 have been fully considered but they are not persuasive.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday, Wednesday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cano Milton can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

September 13, 2006

*Lien Tran*  
LIEN TRAN  
PRIMARY EXAMINER  
*Group 1700*